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No. 150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

THE GEMEX CORPORATION, a New Jersey corporation,
Petitioner,

vs.

A. C. BECKEN CO., an Illinois corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Petitioner, The Gemex Corporation, respectfully prays for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled action on February 28, 1963. The aforesaid judgment of the Court of Appeals affirmed in part and reversed and remanded in part judgments entered by the District Court from which both parties appealed. Respondent's Petition for Rehearing *En Banc* was denied by the Court of Appeals on April 9, 1963. On motion of Petitioner, the mandate of the Court below has been stayed to May 23, 1963 to permit this petition.

OPINIONS BELOW.

The Findings of Fact and Conclusions of Law of the District Court on the issue of damages are reported at 199 F. Supp. 544 and have been annexed to this petition as Appendix C. The Opinion of the Court of Appeals is reported at 314 F. 2d 839, and is annexed hereto as Appendix D.

Previous Findings of Fact and Conclusions of Law of the District Court on the issue of liability were not officially reported. The first Opinion of the Court of Appeals is reported at 272 F. 2d 1 and is annexed hereto as Appendix B.

RECORD.

The record filed with this petition contains certified copies of documents pertaining to both the first appeal (liability) and to the second appeal (damages). For convenience, reference to these documents will be as follows:

Appendix (First Appeal) ..... App.

Joint Appendix (Second Appeal) .... Jt. App.

Exhibit Volume (Second Appeal) .... Ex. Vol.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 28, 1963 and is annexed hereto as Appendix E. Respondent's petition for rehearing *en banc* was denied on April 9, 1963. (Appendix F to Petition).

The jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

QUESTION PRESENTED.

May a court which has determined that a refusal to deal constituted a violation of the anti-trust laws, award damages accruing after the filing of the complaint and not a consequence of acts therein alleged on the assumption that the refusal to deal would continue beyond the period alleged in the complaint.

STATUTE INVOLVED.

The provisions of Title 15, U.S.C. Section 15 are set forth in Appendix A hereto.

STATEMENT.

Respondent, a wholesale distributor of jewelry, including watchbands, brought this action under the Sherman Act against petitioner, a manufacturer of watchbands. The Complaint, filed November 23, 1956, alleged that petitioner's refusal to sell watchbands to respondent resulted from an illegal combination and conspiracy and prayed for treble damages and reasonable attorney's fees.

Trial of the action was held before the District Court and findings of fact, conclusions of law and judgment dismissing the action on the merits were entered on March 27, 1959. On November 24, 1959, the Court of Appeals reversed the judgment of the District Court and remanded the action with instructions to find the issues in favor of respondent and against petitioner, and to assess the amount of respondent's damages (App. B to Petition).

Pursuant to this mandate, trial was had on the issue of damages and on September 29, 1961, the District Court entered its findings of fact, conclusions of law and judgment that respondent recover from petitioner, as treble damages, the sum of $74,294.04 (App. C to Petition).

Both petitioner and respondent appealed from the District Court's award of damages. These appeals were consolidated and heard together with a third appeal on the question of attorney's fees. The latter issue is not here involved.

On February 28, 1963, the Court of Appeals affirmed the aforesaid judgment of the District Court awarding to respondent, as treble damages, the sum of $74,294.04 (App. D to Petition). It is the purported legal basis for this award which petitioner asks this Court to review.

The Damage Issue.

Respondent's theory on the issue of damages is that petitioner's refusal, on August 2, 1956, to supply its Gemex watchbands to respondent subsequently deprived respondent of watchband sales and profits therefrom. Claimed as damages are the loss of such *anticipated* profits.

To compute its alleged loss of future profits from Gemex sales, respondent calculated its profits on such sales in the fiscal year which preceded the cut-off on August 2, 1956. It then projected its anticipated profits for the five following years on the basis of an estimate that its profits would normally have increased by 50% in the first full year following the refusal to deal, by 33% and 25% in the next succeeding years, and by 15% in the final two years. (Finding 13 *et seq.*, App. C to Petition). This estimate, in turn, was based solely upon the opinion of a single witness, respondent's own president (App. 72-75, 95-102). It assumed the availability of a rapidly expanding market for Gemex watchbands.

Respondent's attempt to project its anticipated profits from Gemex sales was further complicated by the fact that respondent failed to preserve records from which

sales and profits from Gemex watchbands before August 2, 1956 could be accurately determined. Invoices showing respondent's sales of Gemex watchbands during this period were destroyed by respondent within two years after the filing of this action (Finding 8, App. C to Petition). Accordingly, in the damage computation such factors as (1) volume of sales, (2) gross receipts, and (3) cost of sales were merely estimated on the basis of other data, and upon other assumptions.

At the trial on the issue of damages, petitioner offered evidence directly attacking respondent's primary assumption—that the available market for Gemex watchbands sold by respondent would have sufficiently increased in the five years following the refusal to deal to enable respondent to have realized increases of 50%, 33⅓%, 25%, 15% and 15% respectively. To demonstrate the error in the opinion of respondent's president, evidence of actual market conditions during the period in question was introduced. This evidence demonstrates that the available market for Gemex watchbands, as well as for watchbands in general sold by respondent, was declining, not increasing as respondent presumed, throughout the damage period (See Ex. Vol., Defendant's Exhibits 1, 2, 8 and 12).

In addition to evidence refuting respondent's estimated losses, petitioner demonstrated that certain of these losses were not, as a matter of law, attributable to its refusal to sell watchbands on August 2, 1956. These include losses incurred after the filing of the complaint herein which were not shown to have resulted as a consequence of acts committed prior to the institution of this suit and constituting part of the cause of action declared on. Since petitioner's refusal to sell watchbands to respondent was not proven nor even alleged to have continued after

November 23, 1956, the date of the complaint, damages arising thereafter were not attributable to any wrongful act of petitioner.

In order to illustrate the error in respondent's claim for damages not attributable to acts alleged in the complaint, and to demonstrate the incorrectness of an assumption that petitioner's refusal to deal of August 2, 1956 would continue indefinitely, petitioner introduced evidence showing that one Ernest Keitel, a Gemex salesman in 1958, solicited respondent for a re-establishment of the account on April 14th of that year (Jt. App. 241-45). This offer to resume selling watchbands to respondent was made in good faith and was not conditioned upon any illegal agreement or restraint (Jt. App. 243-4). Keitel's uncontroverted testimony was that respondent refused to even consider handling Gemex watchbands at that time.

The Award of Damages.

The courts below held, as a matter of law, that respondent was entitled to recover damages arising out of acts subsequent to the complaint and to petitioner's futile attempt to resume selling watchbands to respondent (Conclusions 11-15, App. C to Petition; Opinion; App. D to Petition, pp. 29a-32a).

Proceeding off the assumption that petitioner's refusal to deal continued indefinitely beyond the period alleged in the complaint, the court found, as a matter of fact, that respondent could reasonably have anticipated an increase in profits from sales of Gemex watchbands of 33⅓%, 20%, 10%, 5% and 5% respectively in the five years following the cut-off. This determination was made notwithstanding the uncontroverted evidence that the available market for Gemex watchbands was declining in the years following 1956.

REASONS FOR GRANTING THE WRIT.

The decision of the courts below, awarding damages based upon losses which arose subsequent to the filing of the complaint and which were not a consequence of acts therein alleged, is in conflict with decisions of this Court and of various other courts of appeals. The decision represents a distinct departure from principles long fundamental to the law of damages and to the administration of the anti-trust laws.

1. The Decision of the Courts Below is in Conflict With Decisions of This Court and Departs From Settled Principles in the Law of Damages.

In determining the amount of compensable damages, the courts below included profits estimated to have been lost subsequent to the filing of the complaint herein, but not shown to have been the consequence of alleged acts committed prior to the commencement of the action. The award of such lost profits as damages is contrary to the fundamental law that a successful plaintiff is only entitled to recover for injuries sustained as a result of acts committed prior to the filing of the complaint.

This rule has long been applied in cases arising under the anti-trust laws. In *Taylor v. Loewe*, 1915, 235 U.S. 522, 536, this Court, speaking through Mr. Justice Holmes, said:

"Damages accruing since the action began were allowed, but only such as were the consequences of acts done before and constituting part of the cause of action declared on. This was correct."*

In the instant case, the damages awarded cover losses claimed by the respondent to have arisen as late as January, 1961; over five years after the institution of the action. Such losses are allegedly the result of the continuing day-to-day refusal of petitioner to supply its watchbands as set forth in the complaint of 1956 and as to which evidence was offered by respondent at the trial in 1959. Recovery is postulated on the theory that, so long as such refusal to deal continued, respondent lost profit it would otherwise have enjoyed through its resale of petitioner's product. The error of the courts below is in failing to recognize the converse of this rationale: that when petitioner's refusal to deal ceased to continue, respondent's right to those profits was restored. Subsequent loss of profits could not be attributable to the alleged wrong.**

The record in this case is devoid of evidence that petitioner's illegal refusal to deal, initiated on August 2, 1956, was continued beyond the filing of this action on November 23, 1956. Nor is there evidence that respondent's claimed loss of profits subsequent to the date of the complaint is the consequence of any previous refusal to deal. Indeed,

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* The Court of Appeals in the present case purported to consider this rule and, indeed, cited **Lawlor v. Loewe** with approval (Appendix D, p. 31a). It is apparent, however, that the Court failed to apply the law therein announced.

** This Court, in **United States v. Borden Company**, 1939, 308 U.S. 188 recognized that business conduct prohibited by the Sherman Act is not presumed to continue indefinitely, but "is, in effect, renewed during each day of its continuance."

the "cause of action declared on", referred to in *Loucks v. Loewe*, is necessarily limited to evidence which predates the filing of the action. No supplemental bill alleging a further continuation of illegal acts by petitioner has been filed.

The award of damages accruing after the filing of the complaint and not a consequence of the acts therein alleged, was based solely upon the lower court's *assumption* that petitioner's refusal to deal continued beyond the period alleged in the complaint. It is submitted that the court committed a fundamental error of law by engaging in such an assumption.

In order to demonstrate that such assumption is also incorrect as a matter of fact, petitioner offered evidence at the trial on damages to show that it had attempted to re-solicit the A. C. Becken account in 1958. Ernest Keitel, a former sales representative of petitioner, testified that on April 14, 1958, he called upon Mr. Raymond Feare, respondent's jewelry buyer, at the A. C. Becken Company offices in Chicago to solicit respondent's account as a wholesale distributor of Genex watchbands. Keitel testified (Jt. App. 243-4):

> "A. Well, I of course, introduced myself and told Mr. Feare that I was the new representative in the territory for the Genex Company having just taken over the territory some months previously, and also I mentioned to him that I was hoping that we could show him the line with the anticipation, of course, that they should again carry our line.
>
> Q. Do you recall what he said?
>
> A. Yes, I do, of course. He wasn't, at the time, interested in carrying the line. If I recall, he did mention to me that there was—the reason for this, primarily being—now, I am just substituting; I am imagining it, perhaps, but, because of the fact that

there was a case pending against the Gemex Company, and I guess that is about it.

Q. And that is all that you recall of the conversation?

A. Well, no. I also recall that Mr. Feare did mention to me that they had never done too big a job and that it wasn't that important an item at the time."

This testimony is corroborated by Keitel's own "Daily Report" made in the regular course of business at the time of his conversation with respondent's buyer (Ex. Vol., DX 3).* The testimony and the exhibit clearly demonstrate that the offer to reactivate the account was made in good faith and was not conditioned upon any illegal agreement or restraint of trade. There is no evidence to the contrary.

It is apparent from the opinion of the Court of Appeals (App. D to Petition), that the court merely regarded the evidence of petitioner's attempt to resume selling watchbands to respondent in 1958, as an attempt by petitioner to affirmatively prove that it had ceased its illegal activity on such date. While petitioner does urge this as being the effect of Keitel's testimony, the primary significance of this evidence is to demonstrate the inherent fallacy in the court's assumption that the refusal to deal would continue indefinitely beyond the period alleged in the complaint and proved at the trial.

The failure of the court to perceive the primary significance of petitioner's offer to reactivate the A. C. Becken account, is shown by the opinion of the court (App. D to Petition at pages 30a-31a):

"It is clear from the testimony that Keitel did not even know about the unlawful conduct of defendant,

* The "Daily Report" of Keitel (DX 3) was not admitted into evidence by the District Court but was part of the record before the Court of Appeals pursuant to Rule 43, F.R.C.P.

which terminated the relationship between the parties, or the litigation which followed. Obviously he did not purport, on behalf of defendant, to restore plaintiff to its former unfettered trading position which had existed prior to defendant's unlawful cutoff of plaintiff in 1956."

"On April 14, 1958, when Keitel called on plaintiff, defendant was aware that there was pending a complaint charging that it had unlawfully refused to deal with plaintiff. It is not enough, therefore, for defendant to say of Keitel's solicitation of the account in 1958: 'The offer to reactivate this account was in no way conditioned upon any agreement or restraint. * * * The least that defendant could have done was to have some duly authorized representative conversant with the unlawful act of 1956, offer to resume a distribution of its products by plaintiff expressly unlimited by any unlawful restraint."

"'No evidence introduced or offered by defendant tended to show that it had changed its position from the illegal posture assumed by it in 1956 when it refused to deal further with plaintiff. Defendant argues from this position of nonrepentance, but it cites no persuasive authorities to support it."

The nature of the court's assumption that petitioner's initial illegal act, committed prior to the suit, would continue indefinitely thereafter is clearly demonstrated by the last paragraph of its opinion quoted above. The court held, in effect, that evidence of petitioner's offer to resume selling to respondent was insufficient to offset, as a matter of law, the assumption that such refusal to deal would continue.

Notwithstanding this fundamental error in the application of the law, petitioner submits that the evidence of its offer to resume selling watchbands to respondent refutes

any possible inference or assumption that respondent's losses beyond April 14, 1958 were reasonably attributable to petitioner's wrongful conduct. Keitel's ignorance of the dispute between the parties supports the fact that the offer was bona fide, and not merely an attempt by petitioner to eliminate future liability. What had initially been a refusal to sell, became a mere refusal to buy.

Continuation of petitioner's refusal to deal cannot be assumed after November 25, 1956, the date of the complaint. It was conclusively shown to have ceased by April 14, 1958. The award of damages for losses subsequently sustained is contrary to the established principle that there be proof of a causal relationship between the wrong committed and the loss sustained.

2. There Is a Real and Actual Conflict Among the Circuits on the Question Here Presented.

The decision of the court below is in conflict with decisions of the Second and Ninth Circuits in *Flintkote Co.* v. *Lysfjord*, 9 Cir., 1957, 246 F. 2d 368, cert. den. 355 U.S. 835, and *Connecticut Importing Co.* v. *Frankfort Distilleries*, 2 Cir., 1939, 101 F. 2d 79, and with the decision of the District Court for the District of Maryland in *Frey & Son* v. *Cudahy*, D.C. Md., 1917, 243 Fed. 205. Each of these cases involved the identical question, *i.e.*, whether an illegal refusal to deal may properly be assumed to continue beyond the period alleged in the complaint, and whether an award of damages may be based upon such assumption.

In *Flintkote Co.* v. *Lysfjord*, 9 Cir., 1957, 246 F. 2d 368, the successful plaintiff used as a basis for its damages lost profits which it alleged it would have realized but for the defendant's conspiracy and refusal to deal. The trial court awarded damages for loss of profits incurred up to the date

of the trial, whereas defendant urged the date of the complaint as being the proper limitation. The Court of Appeals reversed, stating in part at pages 394-396:

"Two well-settled propositions of law govern the determination of this issue. Succinctly stated, they are, that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts committed *prior* to the filing of the action; and conversely, a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing of the action. The time of the wrongful act controls the measure of damages. Thus, it becomes necessary to ascertain whether plaintiffs' injuries were caused by a prior act or whether they are attributable to protracted conduct and repetitive acts which continued beyond the date this action was filed."

"Appellees' characterization of the refusal on February 19, 1952, as a '*permanent*' and fixed act is a mere conclusion, and more important, incorrect. In the very nature of things, the announcement lacked finality. It could mean no more than that Flintkote, on that day, was absolutely and unalterably opposed to future dealings with the plaintiffs. Appellees confuse unequivocality with permanency. Flintkote's position was neither irrevocable nor immutable. It was under no legal duty to adhere to that position. On the contrary, it was at all times completely free to reconsider and modify its views."

"This cause of action is founded on an act of a continuing nature. The express refusal to deal constituted no more than a refusal to deal at that time. Plaintiffs' injuries were not caused just by the announced refusal but rather resulted from the explicit refusal coupled with the implied persistence in the announced course of conduct."

> "The proper procedure to be followed in seeking recovery for injuries caused by acts occurring after the filing of the action is to file a separate suit, as was done in *Bordonaro Bros. Theatres* v. *Paramount Pictures, Supra,* or a supplemental action, *Bigelow* v. *RKO Radio Pictures, Inc., supra,* or as the administration of justice dictates upon the remand of the instant case, by a supplemental complaint."

The same principles were applied in *Connecticut Importing Co.* v. *Frankfort Distilleries*, 2 Cir., 1939, 101 F. 2d 79. The Court found that the defendant was guilty of refusing to sell its products to plaintiff because of the latter's failure to adhere to a price maintenance policy but held, that the recoverable damages were only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought. The Court stated at page 81:

> ". . . Here the plaintiff's damages, if any, after the commencement of the suit were due to continued refusal or refusals, in furtherance of the conspiracy, to supply it with the Frankfort products after that time. The unlawful acts which would give rise to such damages had from their nature to be committed in carrying out the conspiracy after the suit was brought. It would be impossible to predict how long such a conspiracy would remain in existence or how long the refusal to sell to the plaintiff would continue and, even if such damages could, in a sense, be treated as the result of refusing to supply before the suit was brought, they would be purely speculative."

Similarly in *Frey & Son* v. *Cudahy*, D.C. Md. 1917, 243 Fed. 205, plaintiff received a judgment for defendant's

refusal to sell in contravention of the anti-trust laws. Limiting damages to the filing of the complaint, the Court said in part at page 206:

> "In this case the only damage proved by the plaintiff was the loss of profits it would have made on resales of Old Dutch Cleanser, if it had been able to buy Old Dutch Cleanser at the price at which other jobbers could obtain it. Such damage is a damage which occurs from day to day, and the damage on one day is not the necessary result of an act done by the defendant at an earlier date."

The foregoing decisions demonstrate as a matter of law that where, as here, liability is predicated upon an alleged refusal to deal, a successful plaintiff is not entitled to an inference that such wrongful conduct will continue after the filing of a complaint containing such allegation. Damages based upon such inferences are not recoverable. These decisions are squarely in conflict with that of the court below.

3. The Question Presented Is Broad and of Importance in the Future Administration of the Anti-Trust Laws.

The question raised by this petition is of public and far-reaching importance and is one of substance. The law of damages is an expanding area of our jurisprudence. Nowhere has its development been more pronounced in recent years than in the field of civil anti-trust litigation.

Admittedly, much of the development in civil anti-trust awards has emphasized the protection of the wronged party against a disability to prove or recover the whole of his losses. While substantial progress has been made in this area through acceptance of new legal bases for recovery and more sophisticated methods of proof, little has been said or done to insure a corresponding develop-

ment in the protection of the rights of one who has committed the wrong.

The instant case presents such a situation. The courts below awarded damages to respondent for a continuing wrong committed by petitioner *without an allegation or proof that the wrong continued.* By indulging in the assumption or inference that the refusal to deal alleged in the complaint continued for over five years after the institution of this action, the courts below effectively denied petitioner its day in court.

CONCLUSION

The resolution of the question presented is so basic to the administration of the anti-trust laws as to make it a matter of public interest to warrant the granting of this Petition for Writ of Certiorari. It is submitted that for the foregoing reasons the petition should be granted.

Respectfully submitted,

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May 23, 1963

APPENDICES.

APPENDIX A.

(Title 15 U.S.C. Section 15)

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 12656 SEPTEMBER TERM, 1959 SEPTEMBER SESSION, 1959

A. C. BECKEN CO., an Illinois corporation,
Plaintiff-Appellant,
v.
THE GEMEX CORPORATION, a New Jersey corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 24, 1959

Before DUFFY, SCHNACKENBERG and PARKINSON,[1] *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Plaintiff, A. C. Becken Co., an Illinois corporation, appeals from an adverse judgment entered in the district court in plaintiff's action for treble damages brought under § 1 of the Sherman Act,[2] following a trial by the court without a jury. Defendant, The Gemex Corporation, a New Jersey corporation, is a manufacturer of watch bands, distributed by it nationally through wholesalers, including plaintiff (until August 2, 1956) and the latter's two principal competitors, The Ball Company and Stein and Ellbogen Company.

1. According to plaintiff's theory, defendant attempted to force plaintiff to enter into a price-fixing agreement

[1] While Judge Parkinson participated in the hearing of oral arguments and a conference of the division judges above-named, he was not present at the time of, and did not participate in, the adoption of this opinion.

[2] 15 U.S.C.A. §1.

for the establishment and maintenance between wholesalers of minimum resale prices on Gemex products and also on products competitive to the Gemex line. Plaintiff contends that defendant had already exacted such an agreement from plaintiff's competitors, and threatened to drop plaintiff as a distributor unless it joined this price-fixing agreement. Plaintiff asserts that, when it refused to do so, defendant carried out its threat to "drop" plaintiff as a Gemex distributor, which resulted in losses to plaintiff for which it is entitled to treble damages.

§ 1 of the Sherman Act provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal[2] * * *."

The trial was on complaint and answer. The court heard the evidence of the parties, made findings of fact and conclusions of law, and entered judgment, dismissing the action with prejudice. Finding 7 is as follows:

> Defendant's refusal to sell was not the result of any combination, conspiracy, or attempt to combine and conspire by defendant and anyone.

---

[2] 15 U.S.C.A. §1.

[3] Plaintiff's complaint charged that defendant—

attempted to engage in a wrongful and unlawful combination and conspiracy.

(a). To prevent and restrict the sale and distribution of Gemex's products, by reason of its refusal, for the unlawful reason stated by Gemex as aforesaid, to sell its products to Becken;

(b) To prevent and restrict the sale and distribution of products manufactured and sold by Gemex's competitors;

(c) To, and did [sic], discriminate against a wholesale distributor, to-wit, Becken, who would not combine and conspire with Gemex to price competitors' lines as directed and dictated by Gemex;

(d) To force and compel Becken to enter into a contract or agreement providing for the establishment and maintenance between wholesalers of minimum resale prices on products competitive to the Gemex line; and

(e) To force and compel Becken to enter into a contract or agreement providing for the establishment and maintenance of minimum resale prices between persons, firms or corporations in competition with each other; and that such acts have unreasonably restrained, do unreasonably restrain, and will continue unreasonably to restrain trade and commerce in violation of the anti-trust laws of the United States of America above cited.

Here is defendant's contention:

> "The defendant, being a manufacturer, may announce to its distributors in advance the circumstances under which it will or will not sell to a given distributor. Such an announcement does not in any way amount to coercion and certainly, if done on a unilateral basis, does not constitute an attempt to conspire, whether in regard to fixing prices, maintaining quality, protecting trade names or trademarks, or any of the many aspects of commercial trade. A merchant or a manufacturer, absent any attempt to monopolize or restrain trade, may exercise discretion as to whom it will sell its products and may refuse to sell for reasons sufficient to itself."

The evidence clearly establishes the following facts:

Tower, defendant's representative, on August 1, 1956, visited plaintiff's office and told its Vice-president Bohlander that plaintiff would be expected to sell lines competitive to defendant's lines at manufacturer-suggested prices. On the following day, Swartman, defendant's sales manager, and Tower talked to president Clark and others of plaintiff, in the latter's office. Tower stated that "it is the philosophy of our company" that to be a Gemex distributor, plaintiff would have to sell competing lines of watch bracelets at prices suggested by manufacturers. Tower also said that he had talked to Stein & Elfbogen Company and The Ball Company, competitors of plaintiff, and, when asked "how he knew that they would uphold, or how they would stop doing this, and he said they had shook hands over it. And he said, 'That is good enough for me'." After further discussion Bohlander suggested that

> "* * * if they would not allow us to sell the line through the salesman, that they at least allow us to show the line in our catalog."

He also stated that—

> "* * * at that point Mr. Tower stood up and he

said, 'Well,' he said, 'we are at an impasse. This is it.'

"And Mr. Swartman said, 'Well,' * * * 'it would seem to me that there is a moral obligation of some kind here, and that we ought to take back the sample lines.' * * *."

Defendant's answer admits that it advised plaintiff on August 2, 1956 that it would no longer sell its products to plaintiff.

The law recognizes that a manufacturer, in the battle for business, has a right to sell to whom he pleases. It follows that he has a right to stop dealing with a dealer because he thinks the dealer is acting unfairly in trying to undermine his trade. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307. He is, however, limited to a legitimate use of this weapon. The right to stop dealing is neither absolute nor exempt from regulation. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155; *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594. In the latter case the court said, at 625:

"* * * If accompanied by unlawful conduct or agreement, or conceived to monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. * * *."

A wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery. Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it *may not* be used to accomplish an unlawful purpose. In the case at bar, the clearly established facts show a plan of operation adopted by defendant, the essential purpose of which was to limit the sale of its products to wholesalers who would agree not to sell below prices stipulated by defendants. Such an agreement is in violation of the Sherman Act. The established facts also show that the refusal to continue plaintiff as a wholesaler of defendant's products was solely because plaintiff would not sell those products according

to defendant's existing illegal plan of doing business in violation of § 1. Plaintiff was not rejected as a customer by defendant because of any other reason. It follows that the facts alleged and established by the evidence state a cause of action under § 1 of that Act. Findings of fact by the district court, inconsistent with those views, are clearly erroneous, under rule 52 (b).[3]

In *Federal Trade Comm. v. Beech-Nut Packing Co.*, 257 U.S. 441, there was involved a system of merchandising which the court said, at 454,

> "* * * goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate* Case was held to be within the legal right of the producer.
>
> "The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain. In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it. * * *"

From what we have said, it is obvious that the district court erred in entering its conclusion of law that no violation of the Sherman Act has been shown by plaintiff.

The district court should have found the issues in favor of plaintiff and this cause will be remanded so that such a finding may be entered, together with judgment accordingly.

2. Defendant relies upon the district court's finding 13, which reads:

> "Plaintiff was not damaged as a result of defendant's refusal to sell watch bands to plaintiff subsequent to August 2, 1956.

[3] 28 U.S.C.A. rule 52(b).

Defendant asserts that the damages were so speculative in nature that it was impossible for the court to conclude that plaintiff had been damaged by any action taken by defendant.

However, we find that virtually uncontradicted evidence shows the following facts:

In the fall of 1954, defendant induced plaintiff to take over the Gemex inventory of a wholesaler who was going out of business and predicted that plaintiff's Gemex annual sales would be as much as $250,000. Plaintiff took on the line and commenced active promotion and sale, putting the line in its catalog which was distributed to thousands of retailers in the United States. Complete sample lines of Gemex brands were distributed by 16 salesmen to the retail trade throughout the middle west. The Marshall Field account was assigned specifically to one salesman and, as a result, that account on August 2, 1956 was about one-third of the total volume of plaintiff's Gemex sales. When defendant withdrew its line, plaintiff's Field account dropped from $25,435.60 in the fiscal year ending January 31, 1956, to $1940.87, in the fiscal year next succeeding August 2, 1956. As a result of the cutoff, plaintiff lost its Christmas last-half business, and its profit on Gemex sales, instead of being as expected $6655 for the fiscal year ending January 31, 1957 (up from $4627.76 the year before), was only $1263.94, or a loss in the fiscal year during which the cutoff occurred of $4391.06.

In the light of 43 years' experience with promoting similar lines of merchandise, plaintiff, after promoting the Gemex watch bands during the first full fiscal year ending January 31, 1956, could reasonably expect a 50% increase in profits for the next year ending January 31, 1957, a 33% increase the following year, a 25% increase the next year and a 15% increase in each of the two succeeding years. Also sustained were losses ranging from out-of-pocket cash expended to losses in closing out the merchandise defendant had first agreed, and then later refused, to take back. These losses totaled $56,097.35.

In addition, $789 was a salary outlay for promotion of defendant's line at Field's, the benefit of which was lost when the cutoff by defendant halted further sales of its merchandise there. Plaintiff concedes that about two-fifths of this item might be fairly deducted because of the sales made during the two years of this promotion activity before the date of the cutoff.

Total losses to plaintiff, thus shown, amount to $56,475.95.

We do not consider that the proof of damages offered by plaintiff was speculative in nature and that it is impossible to contend that plaintiff has been damaged by the action taken by defendant, as the latter contends. Rather, we think, that there was no speculation as to the fact of actual damage and that plaintiff's business was seriously curtailed by the cutoff by defendant. It is not the law that the defendant who caused the damage can be permitted to escape liability because it is difficult for plaintiff to express in terms of dollars, the damages it has suffered. *William H. Rankin Co. v. Associated Bill Posters*, 42 F.2d 152,* where, at 155, the court said:

> * * * This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never actually earned because of the defendants' wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony. * * *"

The district court was led into error in finding as a fact and concluding as a matter of law that plaintiff was not damaged as a result of defendant's conduct. Damage was proved. Finding 13 is clearly erroneous.

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* Cert. denied, 282 U.S. 864.

While the evidence now in the record might be sufficient to justify a direction to the district court to compute therefrom plaintiff's actual damages sustained and make an assessment accordingly, we feel that the ends of justice would be better served if this cause be remanded for the purpose of considering the evidence already in the record on the subject of plaintiff's damages, as well as any proper evidence to be offered by defendant, and rebuttal evidence of plaintiff, on subject of plaintiff's damages, and fixing the proper amount of said damages. Such proceedings we now direct.

3. The judgment of the district court is therefore reversed and this cause is remanded to that court with instructions to (1) find the issues in favor of plaintiff and against defendant, (2) assess plaintiff's damages in the manner and in accordance with the views herein expressed, and (3) enter judgment that plaintiff recover threefold the said damages assessed, and costs of suit, including a reasonable attorney's fee, which the district court shall fix. 15 U.S.C.A. § 15.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

A. C. BECKEN CO., an Illinois corporation, *Plaintiff*, v. THE GEMEX CORPORATION, a New Jersey corporation, *Defendant*.	}	Civil Action No. 56 C 1962

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing pursuant to mandate of the Court of Appeals for the Seventh Circuit (opinion reported at 272 F.2d 1), and the court having considered the evidence already in the record on the subject of plaintiff's damages, and the court having heard and examined the admissible evidence offered by defendant in an effort to affect plaintiff's prima facie proof of damages, and that offered by plaintiff in rebuttal, and the court having heard the arguments of counsel and having read the briefs submitted on the issue now before it, and the court being fully advised, the court enters its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

INTRODUCTORY

1. The evidence in the record concerning many of the factual questions on the damage issue before the court is conflicting and subject to varying degrees of credibility.

2. From an examination and analysis of the testimony and exhibits introduced and admitted into evidence at trial and pursuant to the conclusions of law hereinafter set

forth, and from a careful examination of the weight to be accorded each item of evidence, the court finds that

(a) the plaintiff's prima facie estimated loss figure of $56,475.95 must be reduced by (i) a sum attributable to payment of salesmen's commissions not otherwise credited against plaintiff's estimates of gross purchases from defendant to the extent of estimated sales for which such commissions would be payable; (ii) a sum attributable to excessive estimation of increase in plaintiff's gross sales income from Gemex watchbands;

(b) the plaintiff's prima facie loss figure of $56,475.95 should not be reduced by

(i) any sum attributable to asserted general and administrative expense above that already credited by plaintiff against plaintiff's estimates of gross purchases from defendant;

(ii) any sum attributable to asserted cash discounts allowed by plaintiff to its customers;

(iii) any sum attributable to asserted increases in direct selling by defendant to retailers;

(iv) any sum attributable to asserted excessive estimation of cost of handling Gemex watchbands in plaintiff's inventory subsequent to August 2, 1956;

(v) any sum attributable to asserted excessive estimation of loss on Gemex watchbands closed out by plaintiff subsequent to August 2, 1956

(c) the plaintiff's losses of profits on watchband sales for the years in question must be reduced by losses attributable to causes other than defendant's illegal acts.

Salesmen Commission Expense Not Already Deducted

3. Payment of commissions to salesmen on merchandise sold operates to increase plaintiff's otherwise cost of such merchandise and, correlatively, to decrease plaintiff's otherwise profits on such merchandise.

4. Plaintiff ordinarily paid and would ordinarily have paid a 10% commission on sales of watchbands.

5. One-third of plaintiff's sales and projected sales of Gemex watchbands were to an account concerning sales to which plaintiff paid its salesman a 5% commission plus a salary in an amount approximating an additional 5% of gross sales.

6. The Court of Appeals has, in its opinion (272 F.2d at 5) approved such salary payment as an item of damage, and has reduced it by two-fifths pursuant to a concession by plaintiff referred to in the said opinion. The Court of Appeals having thus considered the salary payment matter in full on its merits and on its facts, this court has no power to make further factual findings as to some other proportion of such salary payment by which plaintiff should be compensated by defendant or, indeed, whether such salary payment was in reality a 5% commission not chargeable as damages.

7. Some sales of watchbands were and would have been attributable to mail order sales on which no salesmen's commissions are paid.

8. The evidence is insufficient to permit a finding as to the exact portion of plaintiff's Gemex watchband sales which were and would have been initiated by mail order, for the reasons, among others, that

(a) within two years after filing the instant suit plaintiff destroyed or otherwise made unavailable all its file copies of sales invoices;

(b) plaintiff's general testimony estimating that only 35% to 40% of its customers were called on by its salesmen in an effort to sell plaintiff's many types of merchandise (some 20,000) is insufficient to warrant the inference either that such customers represented or would have represented that same percentage of gross sales of Gemex watchbands, or that mail order sales receipts from sales of Gemex watchbands represented or would have represented the difference between that percentage and the total of gross sales;

(c) plaintiff's general testimony estimating that 45%, 50% or 60% of its gross sales of all types of merchandise were and would have been mail order sales is insufficient to warrant the inference that mail order sales of Gemex watchbands represented or would have represented that same percentage, and such inference is not credible in view of other evidence concerning the percentage of Gemex watchbands sold to but one account (Field's, Inc.) and the plaintiff's ordinary method of operation;

(d) plaintiff has also testified that its net sales of all types of merchandise in the fiscal year ending January 31, 1957, totaled $2,677,523, and that the customers which its salesmen never see account for "thousands of dollars worth of business";

(e) although the evidence is insufficient to permit of such finding, if the court were to consider that plaintiff's percentage of mail order sales of Gemex watchbands was and would have been the same percentage as its mail order sales of all merchandise, and if the court were to construe plaintiff's evidence concerning "thousands of dollars" as meaning a quarter of a million dollars, the said percentage would constitute no more than 10%;

(f) plaintiff has testified that 5% of salesmen's commissions are also paid on mail order sales of Gemex watchbands whenever a customer buys by mail order within six months of the time when a salesman personally secured an order from that customer;

(g) plaintiff's president testified that he could not tell how many sales of Gemex watchbands in 1955 were made without payment of the 10% commission and that any statement by him as to how many "would only be a guess";

(h) plaintiff has itself deducted 4.5% from all estimated gross sales as commission expense without evidence that the said percentage is an overall weighted average representing sales on commission and sales not on commission.

9. Salesmen's commissions in the amount equivalent to 4.5% of net sales have already been deducted by plaintiff in its damage computations as part of "selling, general and administrative expense" totaling an average of 22.5% of sales.

10. An amount equivalent to an additional one-half of one per cent of one-third of the sales income decrease for the loss of profit on which plaintiff should be compensated, must be deducted as additional salesmen's commission expense which was and would have been attributable to that portion of sales income.

11. An amount equivalent to an additional five and one-half per cent of one-half of the sales income decrease for the loss of profit on which plaintiff should be compensated, must be deducted as additional salesmen's commission expense which was and would have been attributable to that portion of sales income.

12. That portion of sales income decrease not affected by the reductions required under findings 10 and 11 (i.e., one-sixth of sales income decrease; or $16\frac{2}{3}\%$) is attributable to sales, not on commission.

Projections Of Cost Of Purchases
And Gross Sales Income

13. Plaintiff's prima facie estimates of cost of Gemex watchbands it would have purchased from defendant, and plaintiff's projected gross sales income from those goods, based on such purchase estimates for the five fiscal years ending immediately succeeding the August 2, 1956 date of cutoff, were:

	Year Ending	Approx. % increase over prior year	Plaintiff's Estimated Cost	Markup ($\frac{1}{2}$ of Cost)	Plaintiff's Estimated Gemex Gross Sales
(a)	1/31/57	50%	$ 55,000	$27,500	$ 82,500
(b)	1/31/58	$33\frac{1}{3}\%$	73,000	36,500	109,500
(c)	1/31/59	25%	91,000	45,500	136,500
(d)	1/31/60	15%	104,000	52,000	156,000
(e)	1/31/61	15%	120,000	60,000	180,000

14. Plaintiff's actual cost of purchase of, and gross sales income from, all makes of watchbands for the years ending January 31, 1953 through January 31, 1960, are as follows:

Year Ending	Plaintiff's Actual Cost of all Watchbands	Plaintiff's Actual Gross Sales Income from all Watchbands
(a) Jan. 31, 1953	$ 93,617	$123,020
(b) Jan. 31, 1954	139,844	201,718
(c) Jan. 31, 1955	158,521	209,589
(d) Jan. 31, 1956	180,363	248,293
(e) Jan. 31, 1957	114,365	249,392
(f) Jan. 31, 1958	108,163	176,168
(g) Jan. 31, 1959	101,965	142,695
(h) Jan. 31, 1960	106,868	150,510

15. Plaintiff's actual and projected dollar and percentage increases in gross sales income from sales of Gemex watchbands through its fiscal year ending January 31, 1961, are as follows:

Year Ending	Actual and Projected Gemex Sales Income Increase Year to Year Dollar Increase	Percentage Increase
(a) Jan. 31, 1953	—	—
(b) Jan. 31, 1954	$ 1,304	90.68%
(c) Jan. 31, 1955	4,404	173.59%
(d) Jan. 31, 1956	35,777	515.44%
(e) Jan. 31, 1957	[8,733][2]	[25.78%][2]
	39,782[3]	93.13%[3]
(f) Jan. 31, 1958	27,000[4]	32.73%[4]
(g) Jan. 31, 1959	27,000[4]	24.66%[4]
(h) Jan. 31, 1960	19,500[4]	14.29%[4]
(i) Jan. 31, 1961	24,000[4]	15.38%[4]

[1] Actual watchband cost and sales income figures for fiscal year January 31, 1961, were not available at time of hearing.

[2] Decrease.

[3] This dollar amount and percentage is computed solely from gross sales for the first half of this fiscal year, i.e., Feb. 1, 1956 to August 1, 1956. The cutoff occurred on August 2, 1956.

[4] Both dollar and percentage figures are based solely on plaintiff's projected gross sales income for the full fiscal year.

16. Plaintiff's projections of gross sales income and cost of purchases for the fiscal years ending January 31, 1957 through January 31, 1961, are predicated upon yearly percentages by which plaintiff estimated those items would increase.

17. The said estimated yearly increase percentages were applied on *actual* purchase and sales figures for the first half of the fiscal year ending January 31, 1957, and on *estimated* purchase and sales figures for the second half of that fiscal year.

18. Plaintiff's actual sales income from sales of Gemex watchbands to the date of cutoff accounted for the following percentages of plaintiff's actual sales income from sales of all types of watchbands:

Year Ending	Gross Sales Income from all Watchbands	Percentage Attributable to Sales of Gemex Watchbands
(a) Jan. 31, 1953	$123,020	1 %
(b) Jan. 31, 1954	201,718	1.3%
(c) Jan. 31, 1955	209,589	3.3%
(d) Jan. 31, 1956	248,293	47.2%
(e) Jan. 31, 1957	249,392	13.6%[1]

19. Plaintiff's estimated sales income from projected sales of Gemex watchbands would, if accurate, have accounted for the following percentages of plaintiff's actual-plus-estimated sales income from sales of all types of watchbands:

Year Ending	Total of Actual Plus Plaintiff's Estimated Sales Income from all Watchbands	Percentage Attributable to Plaintiff's Estimated Sales of Gemex Watchbands
(a) Jan. 31, 1957	$297,927	27.7%
(b) Jan. 31, 1958	285,668	38 %
(c) Jan. 31, 1959	279,195	49 %
(d) Jan. 31, 1960	301,510	51 %
(e) Jan. 31, 1961	—	—

20. Plaintiff's projections of purchases and sales of Gemex watchbands for the fiscal years ending January 31,

[1] To date of cutoff.

[2] Actual sales income figure for this fiscal year was not available at the time of hearing.

1957 through January 31, 1961, are excessive and inaccurate.

21. Defendant concludes from various figures, computations, and views of the law applicable to this case, that plaintiff's losses attributable to defendant's illegal acts total no more than $3,419.82.

22. Defendant's projections, for the years in question, of plaintiff's losses attributable to defendant's illegal acts are inadequate and inaccurate.

23. Plaintiff's purchases and sales of Gemex watchbands in the fiscal years ending January 31, 1957 through January 31, 1961, would have been not substantially greater nor substantially less than the following:

Year Ending	Approx. % Increase over Prior Year	Cost	Markup	Gross Sales
(a) Jan. 31, 1957	33⅓%	$50,000	$25,000	$75,000
(b) Jan. 31, 1958	20 %	60,000	30,000	90,000
(c) Jan. 31, 1959	10 %	66,000	33,000	99,000
(d) Jan. 31, 1960	5 %	70,000	35,000	105,000
(e) Jan. 31, 1961	5 %	73,000	36,500	109,500

24. Including the figures set forth in finding 23, plaintiff's cost of purchase of, and gross sales income from, all makes of watchbands, for the fiscal years ending January 31, 1953 through January 31, 1960,[1] were and would have been as follows:

Year Ending	Plaintiff's Cost of all Watchbands	Plaintiff's Gross Sales Income from all Watchbands
(a) Jan. 31, 1953	$ 93,617	$123,020
(b) Jan. 31, 1954	139,844	201,718
(c) Jan. 31, 1955	158,521	209,589
(d) Jan. 31, 1956	180,563	248,293
(e) Jan. 31, 1957	146,905	200,427
(f) Jan. 31, 1958	168,163	266,168
(g) Jan. 31, 1959	167,965	241,695
(h) Jan. 31, 1960	176,868	255,510

[1] Actual watchband cost and sales income figures for fiscal year ending January 31, 1961 were not available at time of hearing.

25. Based on the figures set forth in finding 23, plaintiff's income from sales of Gemex watchbands would have accounted for the following percentages of plaintiff's sales income from sales of all types of watchbands:

Year Ending	Gross Sales Income from all Watchbands	Percentage Attributable to Sales of Gemex Watchbands
(a) Jan. 31, 1957	$290,427	25.82%
(b) Jan. 31, 1958	266,168	33.81%
(c) Jan. 31, 1959	241,695	40.96%
(d) Jan. 31, 1960	255,510	41.09%
(e) Jan. 31, 1961	—	—

26. The extreme increases, both in percentage and in absolute gross sales income, for the fiscal years ending January 31, 1955 and January 31, 1956, were attributable in large part to sales and projected sales to one account, Marshall Field and Company, which account defendant had given to plaintiff in the fall of 1954.

27. The said increases in plaintiff's gross sales income for the fiscal years ending January 31, 1955 and January 31, 1956, were not solely due to the efforts of plaintiff in promoting the sale of Gemex watchbands.

28. The actual decreases in plaintiff's yearly sales income from sales of all makes of watchbands between the fiscal years ending January 31, 1957 and January 31, 1961, were due in large, but not in sole, measure to defendant's August 2, 1956, cutoff of Gemex watchbands.

29. Defendant presented uncontroverted evidence showing decreased purchases of Gemex watchbands by plaintiff's competitors in the years following 1956, including the experience of one competitor who took over the Field account from plaintiff.

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* Actual sales income figure for this fiscal year was not available at time of hearing.

30. Defendant presented uncontroverted evidence showing that defendant reduced its advertising and promotion expenditures in years following 1956, but presented no evidence to explain the reason for such reductions.

31. Defendant's reduction in advertising and promotion expenditures had the effect of reducing the general market for defendant's Gemex watchbands.

32. In order to determine whether the post-1956 decreases in the general market for Gemex watchbands were natural decreases (which would have also affected plaintiff's gross sales income), rather than artificially created decreases caused or promoted by defendant in an attempt to insulate itself from the accumulation of damages attributable to its August 2, 1956 cutoff (which should not be considered to reduce plaintiff's damages), the court has evaluated the evidence concerning the said decreases, the evidence concerning defendant's proved reductions in such expenditures, and the evidence concerning the probable effectiveness of plaintiff's own advertising and promotional activities in counter-acting declines in its product market.

33. Plaintiff is entitled to be compensated for loss of profits attributable to the following portions of plaintiff's gross sales income decrease with respect to Gemex watchbands:

Year Ending	Gross Sales Income from all Watchbands[1]	Compensable Portion of Sales Income Decrease
(a) Jan. 31, 1957	$ 41,035	$37,931
(b) Jan. 31, 1958	90,000	81,000
(c) Jan. 31, 1959	92,065	88,100
(d) Jan. 31, 1960	105,000	94,500
(e) Jan. 31, 1961	109,500	98,550

[1] From finding of fact 23.

[2] Computed by deducting actual sales during the cutoff year from total sales, i.e., $75,000 less $43,965.

Damages

34. Plaintiff's gross profit loss, based upon the figures in finding of fact 33, is as follows:

Year Ending	Gross Profit Loss[1]
(a) Jan. 31, 1957	$3,048.31
(b) Jan. 31, 1958	6,406.83
(c) Jan. 31, 1959	7,033.68
(d) Jan. 31, 1960	7,451.91
(e) Jan. 31, 1961	7,868.87
	$31,829.60

35. From the gross profit loss figures set forth in finding of fact 34, there must be deducted amounts computed pursuant to findings of fact numbers 10 and 11, as follows:

Year Ending	Compensable portion of sales income decrease[2]	Finding 10 Deduction	Finding 11 Deduction	Total Deduction
(a) Jan. 31, 1957	$37,951	$ 65.22	$1,046.10	$1,106.32
(b) Jan. 31, 1958	81,000	135.00	2,227.50	2,362.50
(c) Jan. 31, 1959	88,100	146.85	2,422.75	2,569.58
(d) Jan. 31, 1960	94,500	157.50	2,598.75	2,756.25
(e) Jan. 31, 1961	98,550	164.25	2,710.12	2,874.37
				$11,569.02

[1] Computed as bearing the same proportion to compensable sales income as plaintiff's estimated profit loss for fiscal year ending January 31, 1957 ($4,391.06) bears to plaintiff's estimated gross income loss for fiscal year ending January 31, 1957, (2/3 × $55,000 cost plus $27,500 markup) = $55,000).

[2] From finding of fact 33.

36. The actual profit loss for sales lost by plaintiff, for which plaintiff should be compensated, is as follows:

Year Ending	Profit Loss
(a) Jan. 31, 1957	$1,921.99
(b) Jan. 31, 1958	4,304.32
(c) Jan. 31, 1959	4,464.10
(d) Jan. 31, 1960	4,675.66
(e) Jan. 31, 1961	4,994.50
	$20,160.58

37. Plaintiff's compensable damages sustained by reason of defendant's August 2, 1956 cutoff, total $24,764.68. This total includes the amount found by the court to be due on account of compensable profit loss ($20,160.58), the amount attributable to freight charges paid by plaintiff for shipping Gemex catalog inserts ($131.87), printer's handling charge paid by plaintiff for sending catalog inserts to another printer ($27.30), plaintiff's handling and shipping charges concerning Gemex merchandise left in stock ($1,658.78), plaintiff's handling charge for closed-out Gemex merchandise rejected by Gemex ($645.41), plaintiff's costs of close-out advertising and postage ($470.65), plaintiff's profit loss on closed-out Gemex merchandise ($1,202.09), and plaintiff's loss of benefit of promotional expense concerning Marshall Field & Company account ($468.00).

38. Plaintiff's compensable damages, as trebled, total $74,294.04.

CONCLUSIONS OF LAW.

1. Plaintiff's prima facie proof of losses sustained subsequent to defendant's unlawful refusal to continue selling Gemex watchbands to plaintiff, heretofore confirmed as valid by the Court of Appeals (272 F.2d at 5), totals $56,475.95.

2. The actual damages sustained by plaintiff must be computed and assessed by deducting from the prima facie

total of losses, such portions thereof, if any, as are proved attributable to factors (a) unrelated to defendant's unlawful acts, and (b) the joint and several impact of which is not magnified by defendant's unlawful acts or losses attributable to such acts.

3. When estimates of general market conditions, profit percentages, future purchases, the effect of advertising and promotional expenditures upon sales, and the effect of direct selling by manufacturers to retailers, have some valid basis in fact, they are admissible to rebut prima facie damage proofs which themselves are based upon estimates.

4. The weight to be accorded evidence which is based upon estimates and admitted to rebut prima facie proof also based upon estimates depends upon an evaluation of the relative probabilities that one party's estimates will prove more accurate than the others.

5. An evaluation of the probability that estimates of future losses would prove accurate requires an examination of all relevant measurable factors which are not themselves based upon estimates.

6. Evidence of market trends, sales and purchase figures and advertising and promotional expenditures, are among the factors to be examined in evaluating the probability that estimates of future losses would prove accurate.

7. When a defendant manufacturer guilty of an unlawful refusal to sell, subsequently causes or contributes to a decrease in the plaintiff wholesaler's product market by certain acts or changes in its ordinary business activities which are not shown to have been required by business circumstances, the amount of the plaintiff's future sales income and profits lost by reason of defendant's wrongdoing is to be computed without regard to that portion of the decreased market attributable to defendant's acts.

8. Nothing in the Court of Appeals mandate and opinion restricts defendant from introducing *actual* sales and market figures to rebut plaintiff's *estimate* of damage based on sales and market projections.

9. Where, because of an intervening appeal or for other reason, hearing on the damage issue in a case is spread over a lengthy period, evidence of actual occurrences and experiences between the first and the last hearings is admissible for the purpose of confirming or impeaching the estimates of future damage introduced at the first hearing.

10. Destruction or other disposition of records by a party during pendency of a suit to the damage issues of which such records have clear relevance, is a fact which may be considered by the court in determining the accuracy of and weight to be given to that party's evidence on those issues.

11. The evidence concerning a purported offer by defendant in April 1958 to resume dealing with plaintiff is insufficient to prove (a) that defendant made a bona fide attempt to purge itself of the effects of its illegal refusal to deal, or (b) that the illegal refusal to deal then no longer existed, or (c) that plaintiff was thenceforth restored to its former position.

12. An offer to deal by one who has theretofore illegally refused to deal will not operate to terminate the right of an injured buyer to recover for losses sustained past that time, when there is insufficient proof that (a) the newly offered relationship will make the injured party whole, (b) there are no residual damage effects attributable to the original refusal to deal, and (c) the offer is made in good faith and on lawful terms.

13. The damages which may be recovered by one who has sustained injury by reason of a refusal to deal which violates the antitrust laws, are not limited to damages actually sustained to the date of filing of the complaint or of a subsequent supplemental complaint.

14. The Court of Appeals mandate and opinion pursuant to which this court now acts controls the disposition of this cause insofar as the words of the Court of Appeals state conclusions of law expressly or by necessary implication.

15. The Court of Appeals, in its consideration of the appeal heretofore prosecuted in this cause, expressly approved both the general method by which plaintiff computed losses expected for a period of years subsequent to the filing of the complaint, and the admissibility of such expected losses as prima facie proof of damages.

16. This court, pursuant to mandate of the Court of Appeals, has found as a fact that plaintiff has suffered damages by reason of defendant's illegal acts in the amount of $24,704.68. This court concludes as a matter of law that plaintiff is entitled to recover from defendant in this proceeding, as treble damages, the sum of $74,204.04.

Julius H. Miner
Judge

September 29, 1961

APPENDIX D

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1962, JANUARY SESSION, 1963

No. 13577

A. C. BECKEN CO., an Illinois corporation,

Plaintiff-Appellee

v.

THE GEMEX CORPORATION, a New Jersey corporation,

Defendant-Appellant

No. 13578

A. C. BECKEN CO., an Illinois corporation,

Plaintiff-Appellant

v.

THE GEMEX CORPORATION, a New Jersey corporation,

Defendant-Appellee

No. 13750

A. C. BECKEN CO., an Illinois corporation,

Plaintiff-Appellee

v.

THE GEMEX CORPORATION, a New Jersey corporation,

Defendant-Appellant

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

February 28, 1963

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KILEY, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. On these appeals we review the action of the district court on remandment, as directed by us on a prior appeal of this case, *A. C. Becken Co. v. Gemex Corp.*, 272 F. 2d 1 (1959). Upon remandment it was the duty of the district court to assess plaintiff's damages and enter judgment that plaintiff recover treble damages and costs of suit, including reasonable attorneys' fees, to be fixed by the court. The district court conducted a trial on the issue of damages, filed findings of fact and conclusions of law, assessed plaintiff's damages, and entered judgment for plaintiff for treble damages in the sum of $74,294.04 on September 29, 1961.[1] The court subsequently heard evidence, made findings of fact, filed conclusions of law and entered judgment for $25,000 for attorneys' fees and costs of suit in favor of plaintiff on April 12, 1962.

From both the judgments defendant has appealed. From the judgment of September 29, 1961, plaintiff also has appealed.

1. In our 1959 opinion, *supra*, at 5, we concluded that the court was led into error in finding as a fact and concluding as a matter of law that plaintiff was not damaged as a result of defendant's refusal to sell watch bands to it after August 2, 1956. We said "Damage was proved." We added,

> "While the evidence now in the record might be sufficient to justify a direction to the district court to compute therefrom plaintiff's actual damages sustained and make an assessment accordingly, we feel that the ends of justice would be better served if this cause be remanded for the purpose of considering the evidence already in the record on the subject of plaintiff's damages, as well as any proper evidence to be offered by defendant, and rebuttal evidence of plaintiff, on subject of plaintiff's damages, and fixing the proper amount of said damages. Such proceedings we now direct."

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[1] 199 F. Supp. 544.

The record before us shows that the district court on remandment proceeded along the lines suggested. It heard additional evidence which was devoted to actual occurrences during the time which elapsed while the case was being litigated upon appeal. The court thus put itself in a position where it had the benefit, not only of such projections as might have been reasonably based upon the facts appearing at the first trial, which were at that time projected by plaintiff to prove further damages, but it also had the superior advantage of evidence of conditions which had in fact occurred while the case had been on appeal. We concur in the conclusion of the district court that, under these circumstances, evidence of actual occurrences and experiences between the first and last hearings may be considered in connection with the estimates of future damage introduced at the first hearing. Thus, a *forecast* of tomorrow's weather is always subject to confirmation or modification by tomorrow's *observation*. While the evidence at the first hearing was a reliable basis for prognostication and was legally admissible to prove damage, no one can deny that to the extent future events modified its correctness, the entire evidence must be considered together. This, the court did in this case and we find no error in that respect.

2. Plaintiff contends that on remandment the district court erred by considering a deduction for sales commissions in its computation of damages. In its own computation plaintiff had reduced anticipated lost profits by deducting an average figure for sales commissions, this figure being 4.5% which, according to plaintiff, was its "average of all sales, from sales on full 10% commission to sales on no commission at all." However, the district court did not agree and deducted an additional $11,669.02 as sales commissions, determining that one-half of plaintiff's sales were on full commission, resulting in a deduction of $11,002.22 as the difference above the 4.5% average for this amount. The court also determined that on one large account there was a 5% commission and deducted $666.80 as the difference above the 4.5% average. Plaintiff contends that the court left the 4.5% figure stand against all

remaining sales even though they were not subject to any commission.

Recognizing these contentions, the court in finding 8 said:

> "The evidence is insufficient to permit a finding as to the exact portion of plaintiff's Gemex watchband sales which were and would have been initiated by mail order, for the reasons, among others, that
>
> (a) within two years after filing the instant suit plaintiff destroyed or otherwise made unavailable all its file copies of sales invoices;
>
> . . . ."

The destruction of these records is referred to by plaintiff in a brief manner:

> "Defendant argues that it was prejudiced when plaintiff destroyed invoices kept for its own business purposes. Defendant did not make any discovery in this case until after the first appeal was over, and after plaintiff had put in its proof on damages. Defendant never made any discovery on plaintiff's purchases from any seller, or on sales to any buyer. Defendant simply repeats the statement that it was harmed, but never shows how."

We are convinced that in this respect the court acted properly. It was confronted with a difficult task and the difficulty was increased by plaintiff's destruction of its own records within two years after it had filed its suit. In the absence of these records and in view of the uncertainties presented, the court properly estimated this deduction on the basis of existing evidence and reasonable inferences to be drawn therefrom. Plaintiff is not entitled to complain of the results thus reached by the court. The situation which it created by the destruction of these records while the litigation was pending is akin to that created by a party refraining from calling a witness who would be able to testify about a material point. Such conduct is in itself an admission that the introduction of such evidence would be damaging to the party not produc-

ing it. Our attention has not been directed to any evidence in the record to explain why this destruction of records took place while this case was *pendente lite*. The law is well-settled that these circumstances give rise to an inference that the records destroyed would have been unfavorable to plaintiff. It enhances the probative value of such evidence as the court relied upon to prove facts as to which the destroyed records would have been competent proof. 31 C. J. S. 845-847.

The district court in determining the damages which plaintiff was entitled to recover correctly followed the principles of law applicable thereto and we cannot say that its findings of fact were clearly erroneous, under 28 U. S. C. A. Rule 52 (a).

3. Defendant relies upon its alleged offer on April 14, 1958 to resume selling watch bands to plaintiff and contends that what had initially been a refusal to sell, then became a mere refusal to buy, and that no award of damages sustained by plaintiff after that date should have been made. In other words, it is defendant's position that plaintiff's subsequent loss of profits cannot be attributed to the original wrong. We disagree.

Defendant's position is based upon the testimony of Ernst Keitel, a former sales representative, who testified that on April 14, 1958 he called upon Raymond Feare, plaintiff's jewelry buyer, and as "the new representative in the territory" solicited plaintiff's account as a wholesale distributor of Gomex watchbands. Prior to that date Keitel had never met Feare. He was making a call in his own territory, which he had taken over some months previously. He testified that "I was hoping that we could show him the line with the anticipation, of course, that they should again carry our line." Feare was not interested.

On cross-examination, the following occurred:

> Q. Mr. Keitel, did you at that time, make any offer to Mr. Feare to sell him the Gomex line without any agreement or promise upon the part of the A. C.

Becken Company to maintain prices on other competitive lines?

A. No, sir, I did not.

Q. Did you have any conversation with him at all with respect to that subject?

A. No, sir.

Q. Did you know at that time anything about the fact that Gemex had previously refused to further sell its products to Becken unless they agreed to maintain prices on competitive lines?

A. No, sir.

It is defendant's theory that it showed conclusively by Keitel's testimony that its refusal to deal with plaintiff did not continue indefinitely. It characterizes that testimony as showing "its attempt to resolicit the Becken account in 1958." In reply plaintiff points to the routine character of the call in plaintiff by Keitel, who obviously was seeking a customer.

It is clear from the testimony that Keitel did not even know about the unlawful conduct of defendant, which terminated the relationship between the parties, or the litigation which followed. Obviously, he did not purport, on behalf of defendant, to restore plaintiff to its former unfettered trading position which had existed prior to defendant's unlawful cutoff of plaintiff in 1956.

On April 14, 1958, when Keitel called on plaintiff, defendant was aware that there was pending a complaint charging that it had unlawfully refused to deal with plaintiff. It is not enough, therefore, for defendant to say of Keitel's solicitation of the account in 1958: "The offer to reactivate this account was in no way conditioned upon any agreement or restraint. * * *". The least that defendant could have done was to have some duly authorized representative conversant with the unlawful act of 1956, offer to resume a distribution of its products by plaintiff expressly unlimited by any unlawful restraint.

No evidence introduced or offered by defendant tended to show that it had changed its position from the illegal posture assumed by it in 1956 when it refused to deal

further with plaintiff. Defendant argues from this position of nonrepentance, but it cites no persuasive authorities to support it.

4. Defendant contends that plaintiff is not entitled to recover damages for losses incurred subsequently to the filing of the complaint. It says that this "rule" has long been applied to cases arising under the antitrust laws. It cites as its authority *Lawlor* v. *Loewe*, 235 U. S. 522 (1915). However in that case Mr. Justice Holmes, at 536, said:

> "Damages accruing since the action began were allowed, but only such as were the consequence of acts done before and constituting part of the cause of action declared on. This was correct. * * *"

The Supreme Court thereby affirmed the court of appeals, *Lawlor* v. *Loewe*, 2 Cir. (1913), 209 Fed. 721. In the latter case the court said, at 728:

> "We see no error in the admission of testimony showing damages accruing after the commencement of the action. It must be admitted that it is for the interest of all parties that this controversy be disposed of finally in a single action. If a plurality of actions are brought the defendants will have good ground for the complaint that they are subjected to unnecessary expense and annoyance by being compelled to defend a second action, the trial of which will consume several months. The charge of persecution in such circumstances would not be without justification."

The court also said, at 729:

> "The judge charged the jury on this subject as follows:
>
> > 'The only acts of the defendants for which the plaintiffs may recover damages in this case are such acts as are set forth in the complaint and as were done by the defendants or their agents before the suit was commenced, and the plaintiffs are entitled to recover all damages which are the

proximate and natural result of such acts, *including such damages as may have continued or resulted therefrom after the suit was commenced by the plaintiffs*, but cannot recover in this suit for any damages which are the result of the continuation of the alleged conspiracy after the suit was commenced or which are the result of the performance of any acts in furtherance of said conspiracy after the suit was commenced.'

"We think this instruction states the rule correctly. It is based upon authority and common sense. The trial proceeded throughout upon the theory that the only acts of the defendants for which a recovery could be had must have taken place before the suit and must have been acts alleged in the complaint. Damages resulting or continuing from such previous acts might be recovered in the present suit, but no damages resulting from acts committed in furtherance of the conspiracy after the commencement of the suit could be so recovered. In other words, if the damages due to acts done previous to the suit continued thereafter, the plaintiffs could recover; but they could not recover for acts subsequent to the suit or for damages resulting from a continuance of the conspiracy after the commencement of the suit. * * *" (Italics supplied.)

Of course no suggestion is made in the case at bar that any conspiracy existed.

5. In No. 13759, defendant has appealed from the judgment in favor of plaintiff for $25,000, allowed as attorneys' fees, and costs. Defendant argues that this award is excessive and improper under the circumstances of this case. It states that the original trial occupied one and one-half days, and no discovery was taken prior to trial; that, following the prior appeal, only defendant proceeded with discovery, a brief request for production of documents and a short deposition of one of plaintiff's employees, followed by a two-day hearing by the court on the question of damages. It asserts that any difficulty which plain-

tiff encountered in proving damages was brought about by the aforesaid destruction of its records during the course of this litigation.

The district court, before determining the allowance of attorneys' fees, considered the testimony offered by plaintiff as to a reasonable attorneys' fee in this case, including that of a partner of the lawyer who handled the case for plaintiff in both the district court and this court, who testified that he estimated that he devoted to this case in excess of 200 hours and that the trial attorney spent twice as much time. He also testified that another partner, Mr. Morse, now deceased, and Mr. Arthur Dixon, as well as various associates in their law firm, had spent time on it. No time records were kept.

Defendant asks us not to give to the testimony of attorney Edward R. Johnston, who was called by plaintiff and who is admittedly an expert in the antitrust field, the weight given to it by the district court. It submits that we should, based upon the record before us, reverse the judgment order on attorneys' fees and set what we consider a reasonable amount. It calls our attention to the fact that, in comparison to the compensatory damages allowed to plaintiff, an award of $25,000 in attorneys' fees is clearly excessive.

We find and so hold that an award of $17,500 in attorneys' fees to plaintiff would be reasonable and that the amount awarded by the district court is excessive.

For the reasons herein set forth, in No. 13759 that part of the judgment entered on April 12, 1962 awarding $25,000 to plaintiff is reversed and this cause, as to said judgment, is remanded to the district court with instructions to enter a judgment in the sum of $17,500 and costs of suit in favor of plaintiff; and in Nos. 13577-78, the judgment entered by the district court on September 29, 1961 in favor of plaintiff is affirmed.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART, WITH DIRECTIONS.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Thursday, February 28, 1963

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

A. C. BECKEN CO., an Illinois corp., *Plaintiff-Appellee*, vs. THE GEMEX CORPORATION, a New Jersey Corp., *Defendant-Appellant*	No. 13577.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
A. C. BECKEN CO., etc. *Plaintiff-Appellant*, vs. THE GEMEX CORPORATION, etc., *Defendant-Appellee*	No. 13578	
A. C. BECKEN CO., etc., *Plaintiff-Appellee*, vs. THE GEMEX CORPORATION, etc., *Defendant-Appellant*.	No. 13579	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration, whereof, it is ordered and adjudged by this court that in appeal No. 13759 that part the judgment of the said District Court entered on April 12, 1962 awarding $25,000 to plaintiff be, and the same is hereby Reversed, and that this cause, as to said judgment, be, and the same is hereby Remanded to the said District Court with instructions to enter a judgment in the sum of $17,500 and costs of suit in favor of plaintiff.

It is further ordered and adjudged by this Court that in appeals Nos. 13577 and 13578, the judgment entered by the District Court on September 29, 1961 in favor of plaintiff be, and the same is hereby Affirmed, with costs in favor of plaintiff, in accordance with the opinion of this Court filed this day.

APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois.

Tuesday, April 9, 1963

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

A. C. BECKEN CO.,
Plaintiff-Appellant (and Appellee),
No. 13578-13759 *vs.*
THE GEMEX CORPORATION,
Defendant-Appellee (and Appellant).

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Hereby Ordered by the Court that the petition of plaintiff, A. C. Becken Co., for rehearing *en banc*, or in the alternative, for modification of the opinion filed herein, be, and the same is hereby Denied.